Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1995

RUTH CISNEROS,

Petitioner,

v.

THE U.D. REGISTRY, INC., THE APARTMENT ASSOCIATION OF GREATER LOS ANGELES,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

DAVID PALLACK*
LEW HOLLMAN
SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES, INC.
13327 Van Nuys Boulevard
Pacoima, CA 91331-3099
Telephone: (818) 896-5211

RICHARD A. ROTHSCHILD
WESTERN CENTER ON LAW AND POVERTY
3701 Wilshire Boulevard, Suite 208
Los Angeles, CA 90010-2809
Telephone: (213) 487-7211

**Counsel of Record for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I.

Whether a state Legislature may, consistent with the First Amendment, exclude from credit reports information concerning eviction actions that tenants have won or that are pending, settled or dismissed, when the Legislature concludes that inclusion of such information results in the unfair denial of housing to prospective tenants.

II.

Whether private consumer credit reports receive full First Amendment protection like that accorded "robust debate on public issues," or whether they receive intermediate First Amendment scrutiny like that accorded commercial speech or speech on matters of private concern.

PARTIES BELOW

In addition to the parties set forth in the caption, the State of California and Daniel E. Lungren, as Attorney General of California, were parties to the proceeding before the trial court. Neither the State nor the Attorney General were parties in the appellate proceedings. Petitioner does not know whether the State or Attorney General have an interest in the outcome of this petition.

RULE 29 STATEMENT

The constitutionality of California Civil Code §1785.13(a)(3) is drawn into question in this action. Since neither the State nor any agency, officer or employee thereof is a party before this Court, 28 U.S.C. §2403(b) may apply. The State and the Attorney General, however, were parties to the action before the trial court, thus that court did not certify to the State Attorney General the fact that the constitutionality of California Civil Code §1785.13(a)(3) was drawn into question. This petition was served on the Attorney General of California at 1300 I Street, Post Office Box 944255, Sacramento, California 94244-2550.

The constitutionality of 15 U.S.C. §1681c is by implication drawn into question in this action. Since neither the United States nor any federal department, office, agency, officer, or employee is a party to this action, 28 U.S.C. §2403(a) may apply. This petition was served on the Solicitor General of the United States at Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W., Washington, D.C. 20530.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Ruth Cisneros, an individual, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of California, Second Appellate District, entered in this case on April 21, 1995.

OPINION BELOW

The opinion of the California Court of Appeal is reported at 34 Cal.App.4th 107, 40 Cal.Rptr.2d 228. A copy of the court's decision is attached in the appendix to the petition at pages 1a-13a (App. 1a-13a).

JURISDICTION

The California Court of Appeal entered its judgment on April 21, 1995. The California Supreme Court denied review on August 17, 1995. App. 14a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment I of the U.S. Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

California Civil Code §1785.13(a)(3) provides:

> (a) No consumer credit reporting agency shall make any consumer credit report containing any of the following items of information:
>
> * * *

(3) Unlawful detainer actions, unless the lessor was the prevailing party. For purposes of this paragraph, the lessor shall be deemed to be the prevailing party only if (A) final judgment was awarded to the lessor (i) upon entry of the tenant's default, (ii) upon the granting of the lessor's motion for summary judgment, or (iii) following trial, or (B) the action was resolved by a written settlement agreement between the parties which states that the unlawful detainer action may be reported. In any other instance in which the action is resolved by settlement agreement, the lessor shall not be deemed to be the prevailing party for purposes of this paragraph.

15 U.S.C. §1681c provides in pertinent part:

Reporting of obsolete information prohibited

(a) Except as authorized under subsection (b) of this section, no consumer reporting agency may make any consumer report containing any of the following items of information:

(1) Cases under Title 11 or under the Bankruptcy Act that, from the date of entry of the order for relief or the date of adjudication, as the case may be, antedate the report by more than 10 years.

(2) Suits and judgments which, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.

(3) Paid tax liens which, from date of payment, antedate the report by more than seven years.

(4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years.

(5) Records of arrest, indictment, or conviction of crime which, from date of disposition, release, or parole, antedate the report by more than seven years.

(6) Any other adverse item of information which antedates the report by more than seven years.

INTRODUCTION

This case arises from a constitutional challenge to a state law that, like its federal counterpart and the laws of many other states, regulates public record information in credit reports. The issue is whether the First Amendment bars the government from excluding information from private consumer credit reports because that information is contained in a public record. The California Court of Appeal held that the state may not prohibit inclusion of information in credit reports that is culled from a court file or other public record – and that the state's only lawful means to keep this information out of credit reports is to seal the records themselves. This holding prevents the government from effectively redressing discriminatory credit practices in a way that is narrowly tailored to address the *credit reporting problem* without infringing on the public's right to view court records to monitor the government. It also prevents the government from regulating in credit reports much information that may be used to discriminate in the extension of credit or other transactions – such as race, religion, age, marital status or obsolete judgments – simply because it may be found in a court record or other public document.

California Civil Code §1785.13(a)(3) (Section 1785.13) prohibits including certain eviction information in credit

reports – e.g., cases tenants win or that are dismissed – because the California Legislature found that such information is used to automatically deny housing to tenants who may have done no wrong. The Legislature concluded that excluding this information in credit reports was the least restrictive means that would be effective in protecting such tenants. The Legislature also determined that the exclusion promotes the settlement of eviction litigation.

The California Court of Appeal held Section 1785.13 violates the First Amendment, however, because it prohibits accurate reports of information available to the public in court files. One effect of this ruling is to allow landlords to continue their "overwhelming policy" of automatically denying housing to any tenant who has been involved in an eviction case – even if the tenant *won* or was improperly named and had never even lived at the premises.

The opinion also has a potentially profound effect on other statutes. For example, under the lower court's reasoning prohibitions in the federal Fair Credit Reporting Act (FCRA)[1] on credit reports containing obsolete information would be unconstitutional even though these prohibitions have existed for 25 years without a reported challenge. 15 U.S.C. §1681c (prohibiting credit reports of bankruptcy filings more than ten years old; suits and judgments more than seven years old; and records of arrest, indictment, or conviction more than seven years old). The FCRA applies to the states and also allows them to enact additional credit reporting statutes as long as they are not inconsistent with the FCRA. 15 U.S.C. §1681t.

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[1] 15 U.S.C. §§1681-1681t.

At least ten states other than California have enacted their own credit reporting acts with prohibitions on reports of some public records.[2] Moreover, some states may require exclusion from credit reports personal information about age, marital status, race or color – restrictions that would also be unconstitutional because that information is often contained in a court file or other public document. *See, e.g.*, N.Y. [Gen. Bus.] Law §380-j(a)(2) (prohibiting reports about race, religion, color, ancestry or ethnic origin); Cal. Civ. Code §1785.18(c) (prohibiting information about age, marital status, race, color or creed in credit reports used for employment purposes).

The California court also held, in direct conflict with this Court and every federal circuit and district court that has addressed the issue, that private, commercial credit reports receive the special First Amendment protection accorded to "robust debate on public issues" and other "core" speech. App. 4a-5a, 13a. Under this opinion the state may not regulate any information in a credit report unless the regulation can withstand *strict scrutiny*. Before this case, every court that considered the First Amendment protection accorded credit reports held they received, at most, *intermediate* scrutiny like that given to speech on matters of private concern or commercial speech. Those cases include *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760-62, 764, 774 (1985) (credit reports constitute speech on a matter of private concern) and *Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 533-34 (10th Cir. 1987) (credit reports

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[2] These states are Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Mexico, New York and Washington.

containing information from *public records* address matters of private concern).

The California court also held, in conflict with this Court and several other federal courts, that there is a single, "settled" definition of commercial speech. App. 4a. The one it chose – speech that "proposes a commercial transaction" – fails to encompass the commercial speech in this Court's most recent case on the subject, issued just two days before the California court filed its opinion. *Rubin v. Coors Brewing Co.*, ___ U.S. ___, 115 S.Ct. 1585, 1589-94 (1995) (using commercial speech analysis for regulation of alcohol content information on beer labels).

In giving private credit reports full First Amendment protection, the California court did not consider most of the interests advanced by Section 1785.13 – promoting the settlement of litigation, protecting the right to privacy, encouraging fair housing practices, and ensuring fair credit reporting – effectively holding that no matter how compelling the state interests furthered by a credit reporting regulation, the First Amendment protection is virtually *absolute* whenever the regulated information may be found in a court file. The opinion sets forth a much broader rule than necessary to resolve the issue presented, hamstringing the government from overseeing an industry that has been extensively regulated for more than two decades. It also forces the government to choose between competing concerns that were both accommodated by the statute's balanced approach.

This Court should review the lower court's decision to determine the government's ability to regulate the credit reporting industry, to determine the proper First Amendment protection accorded private credit reports,

and to settle questions that affect millions of credit report users and subjects throughout the country.

STATEMENT OF THE CASE

In 1991 the California Legislature concluded that tenants were being unfairly denied housing based on credit reports containing the information that an unlawful detainer action (i.e., eviction) had been filed against them, even when such actions had been dismissed, settled or not pursued. Exh. E,[3] App. 27a-30a. The Legislature also saw that the then-current law – which allowed all eviction information in a credit report except when the tenant had been "adjudged the prevailing party" – "[d]iscourage[d] the use of negotiation and settlement to resolve the dispute. . . . " Exh. E, App. 30a. The parties stipulated that credit reports were used by landlords to automatically reject a prospective tenant for housing "if that tenant has been involved in an unlawful detainer case," regardless of the result. Factual Stipulation for Trial (SF) 24, App. 19a; SF 32, Exh. I, App. 21a, 39a (this is the "overwhelming policy" of landlords who use the U.D. Registry). Thus the ordinary credit remedy of putting an explanation in the tenant's credit file (Cal. Civ. Code §1785.16[4]) was futile. To address this problem, effective

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[3] Exhibit E is a report to the California Senate Committee on Judiciary (July 2, 1991). The parties stipulated that this report was generated in connection with the Legislature's consideration of the bill amending Civil Code §1785.13(a)(3) and that it be admitted in evidence at trial. Factual Stipulation for Trial (SF) 19, App. 19a, 21a. The Court of Appeal referred to this report in discussing the purpose of Section 1785.13. App. 10a.

[4] 15 U.S.C. §1681i(c) is the parallel provision in the FCRA.

January 1, 1992, the Legislature limited inclusion of unlawful detainer information in credit reports to those cases landlords win or where a settlement agreement allows the case to be reported.

Respondent U.D. Registry, Inc. (UDR) and the Apartment Association of Greater Los Angeles (Association) are consumer credit reporting agencies as defined by the California Consumer Credit Reporting Agencies Act (CCRAA),[5] SF 9, 20, App. 17a, 19a, and under the FCRA, 15 U.S.C. §1681a; *Cotto v. Jenney*, 721 F.Supp. 5, 6-7 (D. Mass. 1989). UDR reviews superior and municipal court unlawful detainer case files and sells reports of selected information from them to its landlord customers. SF 12, 22, 25, App. 17a, 19a-20a. The Association is a trade organization with about 27,000 members involved in the residential rental business. SF 6, App. 16a. The Association subscribes to UDR and conveys more than 125,000 UDR reports per year to its landlord members. SF 25, App. 19a-20a.

Petitioner Ruth Cisneros is a single mother with two children who has been a renter in Los Angeles County for 15 years. SF 26, App. 20a. She was the defendant in three unlawful detainer actions that were dismissed; she remained a tenant in good standing after each case. SF 27, App. 20a.

Respondents both filed actions against the state challenging the constitutionality of Section 1785.13. The trial court granted petitioner Ruth Cisneros leave to intervene in both actions. App. 3a.

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[5] Cal. Civ. Code §§1785.1-1785.35. The CCRAA is modeled after the FCRA. *Pulver v. Avco Fin. Services*, 182 Cal.App.3d 622, 633-34 (1986).

The two cases went to trial on stipulated facts. App. 15a-41a. The trial court ruled Section 1785.13 unconstitutional and the Court of Appeal affirmed. *U.D. Registry v. State of California*, 34 Cal.App.4th 107. The Court of Appeal first determined whether the speech regulated by Section 1785.13 was commercial speech. Relying on *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (1976), the court held there was a "settled definition" of commercial speech and that it was limited to speech that "proposes a commercial transaction." App. 4a. Since credit reports do not fit that definition the court held the speech regulated by Section 1785.13 was entitled to full constitutional protection. *Id.* at 4a-5a, 13a.

The California court found that Section 1785.13 was fatally underinclusive because "the restriction against dissemination is limited to one type of publication, thereby failing to achieve its purpose of protecting the subject from other modes of broadcast of the same information." *Id.* at 11a. It reasoned that "If the state is concerned about dissemination of this information, it has the power to control its *initial* release." *Id.* (emphasis added). Rather than limiting the exclusion of the information to credit reports alone, "the government may classify the information, establish procedures for its redacted release, and extend a damages remedy against the government if the government's mishandling of sensitive information leads to its dissemination." *Id.* In effect the court held that, to avoid the claim of underinclusiveness, the state may not restrict any information in a credit report that is culled from a court file or other record available to the public unless the state chooses to suppress public access to those records.

The court acknowledged that the state's "[c]oncern about the availability of rental housing for those needing housing, and particularly those facing eviction, is a valid and significant state interest." *Id.* Given the full First Amendment protection of credit reports, however, the court concluded that the state's interest "does not justify a ban on publication by credit reporting agencies of lawfully obtained truthful information contained in court records open to the perusal of everyone." *Id.* The court did not address the other state interests advanced by the statute and described in its legislative history: promoting the settlement of litigation, protecting the right to privacy, or encouraging fair credit reporting.

The California Supreme Court denied review on August 17, 1995. Chief Justice Lucas and Justice George were of the opinion that review should have been granted. App. 14a.

REASONS FOR GRANTING THE WRIT

I. THE OPINION THREATENS FEDERAL AND STATE STATUTES ACROSS THE COUNTRY AND UNDULY BURDENS THE GOVERNMENT'S ABILITY TO REGULATE CREDIT REPORTS WITHOUT INFRINGING ON THE PUBLIC'S RIGHT TO VIEW COURT RECORDS

The opinion of the court below prevents the government from regulating a vast amount of information in credit reports simply because the same information may be found in a court record or other public document. It thereby prevents the government from effectively targeting discriminatory credit practices in a way that is narrowly tailored to address the *credit reporting* problem

without infringing on the public's right to view court records, which serves other important interests such as the need to monitor the government and ensure fair trials. This Court should review that holding because it unduly restricts the ability of both the federal and state governments to effectively prevent abusive credit practices and it forces the government to choose between competing public policies that were both accommodated through Section 1785.13's more balanced approach.

A. The Opinion Threatens the Validity of Numerous Federal and State Statutes

As the lower court itself recognized, Section 1785.13(a)(3) is far from the only statute that prohibits dissemination in credit reports of information obtained from files available to the public. Other portions of Section 1785.13 limit "the information which a consumer credit reporting agency can report, precluding reports of bankruptcies, lawsuits, satisfied and unsatisfied judgments, tax liens, criminal records or other adverse information if any of those events antedate the report by a certain number of years." App. 10a. These or similar restrictions are found not only in California law, but in the FCRA and many other state acts as well. For 25 years, the FCRA has prohibited credit reports of bankruptcy filings more than ten years old; suits and judgments more than seven years old; and old arrest, indictment and conviction records. 15 U.S.C. §1681c. At least ten states other than California have similar restrictions.[6] Under the

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[6] *See, e.g.*, Ky. Rev. Stat. §367.310 (prohibiting reports of criminal charges that do not result in convictions); Minn. Stat.

California court's rationale, *all* these federal and state provisions are unconstitutional.

Moreover, the opinion threatens statutes that prohibit personal information such as age, marital status, race or color in credit reports. *See, e.g.*, N.Y. [Gen. Bus.] Law §380-j(a)(2); Cal. Civ. Code §1785.18(c). Under the lower court's opinion, these statutes would also be unconstitutional because the restricted information is often contained in a court file, marriage license, birth certificate, or other public record.

Further, if Congress or a state finds that certain stereotyped classifications result in adverse credit or insurance practices – e.g., increased medical insurance rates for victims of domestic violence – under the California opinion the government may not prohibit credit reports from containing information about whether a person was such a victim simply because she sought help through the judicial system. *See, e.g.*, Cal. Fam. Code §6200 *et seq.* (Domestic Violence Prevention Act); Cal. Code Civ. Proc. §527.6 (providing for restraining orders against various kinds of harassment).

These same issues arise in other contexts. For example, the Federal Election Campaign Act, 2 U.S.C. §§431-455, requires political committees to report the name, address, occupation and employer of each person who contributes

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§504.30(4)(b) (prohibiting reports of eviction actions without dispositions); N.Y. [Gen. Bus.] Law §380-j(f)(1)(ii) (prohibiting satisfied judgments over five years old; other prohibitions similar to FCRA); Kan. Stat. Ann. §50-704 (prohibitions similar to FCRA); Md. Code Ann. Com. Law §14-1203 (same as FCRA); Mass. Gen. Laws Ann. ch. 93 §52 (similar to FCRA); Mont. Code Ann. §31-3-112 (similar to FCRA); N.H. Rev. Stat. Ann. §359-B:5(I)(a) (same as FCRA); N.M. Stat. Ann. §56-3-6 (similar to FCRA); Wash. Rev. Code §19.182.040 (same as FCRA).

$200 or more per year. 2 U.S.C. §434(b)(3)(A). Although this information is available for public inspection and copying, it cannot be used to solicit contributions or for any "commercial purposes."[7] 2 U.S.C. §438(a)(4). In *Federal Election Commission v. Political Contributions Data, Inc.*, 753 F.Supp. 1122, 1132-33 (S.D.N.Y. 1990), a company that compiled and sold reports of this otherwise public information – much like UDR does – made a First Amendment challenge to the "commercial purposes" prohibition. The district court held the statute lawfully restricted commercial speech. *Id.* The Second Circuit reversed, however, by narrowing the definition of "commercial purposes," thus avoiding the "important and troubling First Amendment implications raised by" the district court's construction of those terms. *Federal Election Commission v. Political Contributions Data, Inc.*, 943 F.2d 190, 192 (2d Cir. 1991). As this case demonstrates, the constitutional issue avoided by the Second Circuit is a recurring one that should not remain unresolved.

Several states have also attempted to regulate the commercial use of public court records in contexts other than credit reports and the circuits are split on the constitutionality of these prohibitions. The Fifth Circuit held unconstitutional a Texas statute that prohibited the sale or use of public records concerning motor vehicle accidents to solicit business. *Innovative Database Systems v. Morales*, 900 F.2d 217, 219 (5th Cir. 1993). The Eleventh Circuit indicated its disapproval of a Georgia statute that prohibited the use of public law enforcement records for commercial solicitation, *Speer v. Miller*, 15 F.3d 1007, 1010 (11th Cir. 1994), and on remand the district court held the

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[7] Newspapers, magazines and books are exempt from the "commercial purposes" restriction. 11 C.F.R. §104.15(c).

statute unconstitutional. *Speer v. Miller*, 864 F.Supp. 1294, 1302 (N.D. Ga. 1994).

The Tenth Circuit, however, in *Lanphere & Urbaniak v. State of Colorado*, 21 F.3d 1508, 1516 (10th Cir.), *cert. denied*, 115 S.Ct. 638 (1994), upheld against a First Amendment attack a Colorado statute that prohibited access to public criminal records if the purpose was to use them to solicit business. *See, also, DeSalvo v. State of Louisiana*, 624 So.2d 897 (La. 1993), *cert. denied*, 114 S.Ct. 1067 (1994) (2-1 decision of Louisiana Supreme Court upholding a state statute that denied access to public motor vehicle accident reports to attorneys who sought to solicit business).

The reasoning of the California court places in jeopardy the FCRA and numerous state statutes that have for many years protected not just tenants, but other individuals. It also unduly limits the government's ability to regulate credit reports to protect those who use the judicial system to resolve disputes. A ruling in this case could uphold these long-standing federal and state credit reporting statutes and clarify the appropriate standards to be applied in evaluating restrictions on the commercial use of public records that arise throughout the nation.

B. The Opinion Forces the Government to Choose Between Competing Concerns That Were Both Accommodated by Section 1785.13's Balanced Approach

The California Legislature found that certain unfair rental practices were facilitated through credit reports of unlawful detainer actions without judgments or that the tenant won. Exh. E, App. 27a-30a. These unfair rental practices were not caused or fostered by media reports of newsworthy eviction cases or by the general public's

right to view court files. The state thus regulated only credit reports because that is the only forum that promoted the unfair rental practices.

At the same time the Legislature was aware of the importance of the general public's right to view court records. Citizens have a common law right – though not a First Amendment right – to inspect public writings. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978); *Craemer v. Superior Court*, 265 Cal.App.2d 216, 220 n.3 (1968). The purpose of this right is to "[k]eep a watchful eye on the workings of public agencies . . . and the operation of government . . . ."[8] *Nixon v. Warner Communications*, 435 U.S. at 598; *Estate of Hearst*, 67 Cal.App.3d 777, 782 (1977) (purpose is to "prevent secrecy in public affairs."); cf. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("With respect to judicial proceedings . . . the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.").

The California Legislature balanced and reasonably accommodated these two important concerns through Section 1785.13 – as did Congress in enacting the public record prohibitions in 15 U.S.C. §1681c. Accommodating competing concerns is a substantial governmental interest. In *United States v. Edge Broadcasting Co.*, ___ U.S. ___, 113 S.Ct. 2696, 2704 (1993), this Court upheld a statute prohibiting radio lottery advertisements in a state where lotteries were illegal, even though people in that state

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[8] This right is not absolute. *Nixon v. Warner Communications*, 435 U.S. at 598 (access may be denied "where court files might have become a vehicle for improper purposes."); *Estate of Hearst*, 67 Cal.App.3d at 782 (right of access may be restricted by "statute or countervailing public policy.").

heard lottery ads from a nearby state, because it accommodated the competing concerns of states that allowed lotteries and those that prohibited them. This Court found that "This congressional policy of balancing the interests of lottery and nonlottery States is [a] substantial governmental interest . . . . " *Id.*

Balancing competing concerns means, of course, that neither policy is completely advanced; it does not follow, however, that the statute is "underinclusive" or otherwise constitutionally flawed, as the California court concluded here. App. 11a-12a. In *Edge*, for example, this Court upheld the statute even though the lower court found that listeners were "inundated" with radio lottery advertisements from the nearby state. This Court held that the statute directly advanced the government's interests because it *reduced* the amount of lottery ads they heard. 113 S.Ct. at 2703-05. Here, the fact that the state limited its regulation to credit reports without entirely suppressing public access to eviction records does not mean the statute is constitutionally infirm, as held by the court below. App. 11a ("Section 1785.13, subdivision (a)(3) contains the same flaw found in the *Daily Mail*[9] and *Florida Star*[10] cases – the restriction against dissemination is limited to one type of publication, thereby failing to achieve its purpose of protecting the subject from other modes of broadcast of the same information."). In contrast to the statutes in *Daily Mail* and *Florida Star*, the California Legislature did *not* intend to completely suppress the regulated information. It simply intended to control its

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[9] *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

[10] *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

dissemination in credit reports, the *only* medium that facilitates the unfair credit practices.

This limited purpose distinguishes Section 1785.13 from the statutes in *Daily Mail* and *Florida Star*, where each statute "failed to accomplish its stated purpose" because it was supposed to "preserve the anonymity" of either a rape victim or juvenile accused of a crime. *Daily Mail*, 443 U.S. at 104-05 (statute failed because only newspapers were prohibited from publishing juvenile's name but radio stations were allowed to broadcast it); *Florida Star*, 491 U.S. at 540-41 (statute failed because only media were prohibited from disseminating victim's name). Here, in contrast, the California court acknowledged that "The report of the Senate Committee on Judiciary stated that the purpose of [Section 1785.13] 'is to prevent a meritless eviction lawsuit from being included in a *consumer credit report.*' " App. 10a (emphasis added). The Senate report states that "inappropriate inclusion of information about unlawful detainer actions [in credit reports] results in 'tenant blacklisting' and imposes an unfair and unnecessary hardship on tenants seeking rental housing." App. 10a-11a. *Nothing* in the legislative history of Section 1785.13, however, indicates that *media reports* of newsworthy eviction cases or the *general public's right to view court files* contributes to tenant blacklisting or imposes unfair hardships on tenants seeking rental housing.

This Court has recognized that when the government has the power to enact "a wholesale prohibition" of certain conduct it may take the "less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising." *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 346 (1986) (upholding statute

that prohibited gambling advertisements to residents of Puerto Rico but allowed gambling advertisements to tourists). Similarly, in this case, since the state may ban the public from viewing court records,[11] it should also be allowed to take the less intrusive step of regulating a particular commercial use of those records which it has determined causes much social harm. Cf. *Lanphere & Urbaniak v. State of Colorado*, 21 F.3d at 1513-16 (upholding against a First Amendment attack a statute that prohibited access to public criminal records only if the records were to be used to solicit business).

The lower court's broad holding – that the government must restrict public access to court files if it wants to regulate in credit reports any information found in them – should be reviewed because it unduly restricts the ability of Congress and the states to accommodate competing public policies and it forces the government to take a far more intrusive approach towards the public's right to view court files than necessary to address a problem associated only with credit reporting.

II. THIS COURT SHOULD RECONCILE THE TENSION BETWEEN THOSE CASES GIVING FULL PROTECTION TO REPORTS ABOUT LEGAL PROCEEDINGS AND THOSE GIVING REDUCED PROTECTION TO CREDIT REPORTS

Three cases of this Court, as read by the California Court of Appeal, are in tension with cases of this Court

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[11] *See, e.g.*, Cal. Fam. Code §9200 (denying public access to adoption records); Cal. Fam. Code §7643 (denying public access to Uniform Parentage Act records); Cal. Welf. & Inst. Code §827 (denying public access to juvenile court records).

and other federal courts that hold credit reports are entitled to intermediate First Amendment protection. Those three cases, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469; *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97; and *The Florida Star v. B.J.F.*, 491 U.S. 524, used a strict scrutiny analysis to strike down sanctions on newspapers that published the names of crime victims or perpetrators which they had lawfully obtained from court records or other public sources. The California court found those cases "answer almost all the questions presented by our case." App. 9a.

> " '[I]f there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish. Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.' "

Id. at 6a (quoting *Cox Broadcasting*, 420 U.S. at 495). The California court found these cases dispositive because the "information subject to the publication prohibition of section 1785.13, subdivision (a)(3) is lawfully obtained by UDR through its examination of court records which are open to public inspection." *Id.* at 9a. Similarly, the Fifth Circuit relied on those same three cases to hold unconstitutional a Texas statute that prohibited the sale or use of public records about motor vehicle accidents to solicit business. *Innovative Database Systems v. Morales*, 900 F.2d at 219.

In contrast, this Court and *every* federal circuit and district court to consider the First Amendment protection accorded to credit reports holds that they receive the *reduced* protection of speech on matters of private concern or commercial speech. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. at 760-62, 762 n.8 (plurality opinion) (credit report does not address a matter of public concern), 764 (Burger, C.J., concurring) (same), 774 (White, J., concurring) (same); *Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d at 533-34 (fact that credit reports contained information from *public filings* had "no constitutional significance" because "[t]he public interest in requiring public filings does not necessarily and automatically attach to and follow extracts from those filings and convert private [credit] reports compiled for private purposes into a matter of public concern."); *Towers Financial Corp. v. Dun & Bradstreet, Inc.*, 803 F.Supp. 820, 824 n.3 (S.D.N.Y. 1992) (credit reports are commercial speech); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 832-33 (8th Cir. 1976) (credit reports are commercial speech).

The California court recognized the "tension . . . between the First Amendment right to free speech and the Legislature's desire to protect prospective tenants by limiting the information a credit agency may report . . . . " App. 2a. This Court should resolve that tension by clarifying the proper First Amendment protection that should be accorded to *private* credit reports containing accurate restatements of information found in *public* records.

III. THIS CASE PRESENTS THE OPPORTUNITY TO DETERMINE THE PARAMETERS OF COMMERCIAL SPEECH OR OTHER SPEECH RECEIVING INTERMEDIATE FIRST AMENDMENT SCRUTINY

A. There is No "Settled" Definition of Commercial Speech

The California court decided a substantial and unsettled federal question arising under the Constitution – the definition of commercial speech. Relying on *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. at 762, the court held that there was a "settled definition" of commercial speech and that it was limited to speech that "proposes a commercial transaction." App. 4a. The court concluded that since credit reports of information about eviction cases do not propose a commercial transaction, they are not commercial speech. *Id.* at 4a-5a. Accordingly, it concluded that credit reports must receive the same *full* First Amendment protection as that accorded "robust debate on public issues" and other "core" speech. *Id.* at 4a-5a, 13a.

The "proposal of a commercial transaction" is certainly one definition of commercial speech – and arguably, some language in this Court's cases have suggested that it may be the only definition. *See, e.g., Board of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989) ("There is no doubt that the . . . 'Tupperware' parties the students seek to hold 'propose a commercial transaction,' which is *the* test for identifying commercial speech.") (citing *Va. Pharmacy Board*, 425 U.S. at 762) (emphasis added). Nonetheless, this Court has used definitions other than the "proposal" of a commercial transaction to define commercial speech. In *Central Hudson Gas & Elec. Corp. v.*

Public Service Comm'n, 447 U.S. 557 (1980), for example, this Court stated the speech at issue "restricts only commercial speech, that is, *expression related solely to the economic interests of the speaker and its audience.*" *Id.* at 561 (emphasis added); *see, also, Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. at 762 & n.8 (using the same definition in comparing credit reports to commercial speech). Most recently, in *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585, 1589-94, this Court analyzed alcohol content information on a beer label under the commercial speech doctrine. If commercial speech were limited to only that which "proposes" a commercial transaction, information on product labels would not be included.

Federal circuit and district court cases have found commercial speech standards applicable in many cases involving speech that does not even remotely propose a commercial transaction. *See, e.g., Ass'n of Nat'l Advertisers v. Lungren*, 44 F.3d 726, 731 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 62 (1995) (product labels are commercial speech; upholding California statutory restrictions on use of words such as "biodegradable" and "recyclable" in product labels); *ES Dev., Inc. v. RWM Ent., Inc.*, 939 F.2d 533, 547 (8th Cir. 1991) (injunction prohibiting automobile dealers from communicating with automobile manufacturer or "engaging in any form of individual . . . or coordinated activity . . . concerning the development, construction or operation of a new auto mall" lawfully restricted commercial speech); *Kleiner v. First National Bank*, 751 F.2d 1193, 1203-07 and 1203 n.22 (11th Cir. 1985) (order prohibiting bank from contacting class members to persuade them to opt out of class action affected only commercial speech and was constitutional); *Briggs & Stratton Corp. v. Baldridge*, 728 F.2d 915, 917-18 (7th Cir.

1984) (statute prohibiting responses to questionnaire about company's relationship with Israel and Israeli firms upheld as regulating commercial speech); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d at 832-33 (credit reports are commercial speech); *Towers Financial Corp. v. Dun & Bradstreet, Inc.*, 803 F.Supp. at 824 n.3 (credit reports are commercial speech); *Brandt v. State Farm Automobile Ins. Co.*, 693 F.Supp. 877, 881 (E.D. Cal. 1988) (California's "bad faith" insurance statute regulating insurers' settlement discussions is constitutional regulation of commercial speech).

The "proposal of a commercial transaction" definition is perhaps the most often quoted standard simply because advertising is the most common and most litigated form of commercial speech. But it should be clear that advertising is not, as the decision below would have it, the exclusive category of speech receiving reduced constitutional protection. Thus, in *Dun & Bradstreet v. Greenmoss Builders*, this Court compared credit reports to "speech solely in the individual interest of the speaker and its specific business audience" – the definition used in *Central Hudson* – and noted that "many of the same concerns that argue in favor of reduced constitutional protection" for commercial speech apply to credit reports as well. 472 U.S. at 762 & n.8. Because of these similarities the Court treated credit reports as speech on a matter of private concern, comparable to commercial speech,[12]

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[12] This was the conclusion of the U.S. District Court in *Towers Financial Corp. v. Dun & Bradstreet*, which held credit reports to be commercial speech because "they function much like advertising – they are directly related to the customers' decision whether or not to enter a commercial transaction with [the report's subject]." 803 F.Supp. at 824 n.3.

holding they were subject to reduced constitutional protections. As with the product labels in *Rubin v. Coors Brewing Co.*, the fact that credit reports do not "propose a commercial transaction" does not mean they are not commercial speech or that they take on characteristics entitling them to the same First Amendment protection accorded "core" First Amendment speech.

This Court has not determined the final parameters of commercial speech or similar speech receiving reduced First Amendment protection.[13] This case presents the opportunity to define it or clarify the factors to consider in a commercial speech analysis.

B. The Public/Private Concern Doctrine is Not Limited to Defamation Cases

The court below dismissed as irrelevant *Dun & Bradstreet v. Greenmoss Builders*, this Court's only case discussing the level of protection to be afforded credit reports, stating that while the distinction between speech on matters of public and private concern "may be significant in the area of defamation, it does not define the parameters of permissible regulation for truthful reporting." App. 12a. That analysis, however, elevates one factor into the entire rule for the public/private concern

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[13] In 1985 the California Supreme Court reviewed several of this Court's commercial speech cases, noted the various "phrases" used to "evaluate" commercial speech, and concluded that "[t]here is no clearly articulated test to determine what constitutes commercial speech" under federal law. *Spiritual Psychic Science Church v. City of Azuza*, 39 Cal.3d 501, 510-11 (1985).

doctrine, a result that is inconsistent both with the language and rationale of *Dun & Bradstreet* and other federal courts.[14]

The public/private concern distinction has been used by this Court in the context of a First Amendment challenge to restrictions on *truthful, non-defamatory* speech. In *Connick v. Myers,* 461 U.S. 138 (1983), the issue was whether an assistant district attorney could be terminated for insubordination in circulating a questionnaire among other office attorneys soliciting their views on the performance of the district attorney. *Id.* at 141. This Court upheld the termination, concluding the speech involved a matter of private concern because the dispute arose out of an internal transfer decision; the assistant district attorney "did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities . . . . " *Id.* at 148. Other non-defamation cases also use the public/private concern analysis. *See, e.g., Knowlton v. Greenwood Ind. School Dist.,* 957 F.2d 1172, 1177-78 (5th Cir. 1992) (complaints about being required

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[14] Moreover, in this case the information in the report is "truthful" only in the sense that an unlawful detainer action was filed. The California Legislature properly considered the bare fact that an unlawful detainer action was filed to be *misleading* because it rests upon *unproven allegations.* SF 24, App. 19a; Exh. E, App. 30a (credit reports of unlawful detainer actions without judgments are "often misleading and may cause the users of such reports to draw unfair conclusions about a tenant.") (report to California Senate Committee on Judiciary, July 2, 1991). Indeed, when tenants win these cases – which would happen in a "significant number" of them if they went to trial – the prior credit reports are more fairly characterized as "truthful" reports of *false* information. SF 18, App. 19a (tenants would win a significant number of unlawful detainer actions that are dismissed, settled or not pursued).

to work after hours without pay "are private, not public, concerns"); *Ferrara v. Mills*, 781 F.2d 1508, 1515 (11th Cir. 1986) (teacher's statements about registration process and teacher assignments "did not relate to a matter of public concern"); *Gomez v. Texas Dept. of Mental Health*, 794 F.2d 1018, 1022 (5th Cir. 1986) (statements about treatment of mentally ill patients at state hospital did not address matter of public concern because speaker did not seek "to alert the public to any . . . wrongdoing . . . . ").

The protection accorded to particular speech is determined by the *general activity* engaged in, not by the truth or falsity of a specific report. *See, e.g., Florida Star*, 491 U.S. at 536-37 ("[T]he news article concerned 'a matter of public significance' . . . . That is, the article *generally*, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities.") (emphasis added). This Court should give federal and state courts guidance as to how the credit reports regulated by Section 1785.13 – and those regulated by 15 U.S.C. §1681c and analogous state statutes – should be analyzed to determine whether they address matters of public or private concern.

C. The Business of Private Credit Reporting is Constitutionally Distinct From Media Reports to the General Public about Matters of Significant Public Concern

The three cases the California court relied upon to resolve this case involve speech with materially different First Amendment concerns than private consumer credit reports: they address *media* reports to the *general public*

about matters of significant *public concern. Cox Broadcasting v. Cohn*, 420 U.S. at 495-96; *Smith v. Daily Mail Publishing Co.*, 443 U.S. at 102-04; *The Florida Star v. B.J.F.*, 491 U.S. at 536-37. Each case turned on the *general public*'s right to know about criminal activity, which this Court in *Florida Star* described as a matter of "paramount public import." 491 U.S. at 536-37.

There are important reasons to treat the business of private credit reporting differently from the public's right to view court records. The media and the public have access to court records to monitor the government and ensure fair trials. *Nixon v. Warner Communications*, 435 U.S. at 598; *Estate of Hearst*, 67 Cal.App.3d at 782. The credit reports regulated by Section 1785.13 are not made for those public purposes; they are sold for the private financial benefit of credit reporting agencies and their landlord customers. While such speech is still important, commercial speech enjoys a " 'limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.' " *Board of Trustees v. Fox*, 492 U.S. at 477 (citation omitted). Unlike public media reports, credit reports have nothing to do with core First Amendment values of "robust debate on public issues."

Every federal case addressing the First Amendment protection accorded credit reports hold they receive the *reduced* protection of commercial speech or speech on a matter of private concern. *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. at 760-62, 762 n.8, 764, 774 (plurality and two other justices holding credit report does not address a matter of public concern); *Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d at 533-34 (credit reports containing information from *public records* addressed matters of private concern); *Towers Financial Corp. v. Dun &*

Bradstreet, Inc., 803 F.Supp. at 824 n.3 (credit reports are commercial speech); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d at 832-33 (credit reports are commercial speech). The California court should not have so easily dismissed these authorities.

Dun & Bradstreet v. Greenmoss Builders applies to the issues in this case as much as *Cox Broadcasting, Daily Mail* and *Florida Star*. In *Dun & Bradstreet* a credit reporting agency was sued for an inaccurate report that the plaintiff had filed a petition for bankruptcy. 472 U.S. at 751. The report was obtained from a review of "bankruptcy pleadings." *Id.* at 752. Comparing credit reports to commercial speech, this Court concluded that the credit report at issue did not address a matter of public concern and thus received reduced constitutional protection. *Id.* at 760-62, 762 n.8, 764, 774. Although the falsity of the entry was one factor considered by the Court (*id.* at 762), it was hardly determinative. "[N]o public issue" was involved because: the speech was "solely in the individual interest of the speaker and its specific business audience;" the report "was made available to only five subscribers;" credit reporting, "like advertising, is hardy and unlikely to be deterred by incidental state regulation;" and credit reporting is "solely motivated by the desire for profit." *Id.* at 762. As Justice Powell concluded, "There is simply no credible argument that this type of credit reporting requires special protection to ensure that 'debate on public issues will be uninhibited, robust, and wide-open.' " *Id.* (citation and brackets omitted). The type of report in *Dun & Bradstreet* – a review of court records, sent to a few subscribers, concerning only the interest of the speaker and its audience, solely motivated by the desire for profit

– is identical to the reports regulated by Section 1785.13. SF 20-25, App. 19a-20a.

The lower court's holdings that there is a single, settled definition of commercial speech – which does not include credit reports – and that the public/private concern doctrine does not apply to non-defamatory credit reports conflict with every federal case that has addressed the constitutional protection accorded to credit reports. This Court should resolve the conflict between these cases.

CONCLUSION

The opinion below rests on an erroneous interpretation of federal law and requires any regulation of information in credit reports to withstand strict scrutiny. As a practical matter this means that neither the state nor federal government can restrict in a credit report any truthful information available in public records – regardless of the potential for unfair or discriminatory use of that information or how ineffective other methods of addressing the problem may be. This broad holding unduly restricts the government's ability to govern an industry that has been significantly regulated for 25 years and prevents it from balancing competing concerns that are accomodated by Section 1785.13, 15 U.S.C. §1681c, and their counterparts throughout the nation.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Date: November 14, 1995

Respectfully submitted,

San Fernando Valley Neighborhood Legal Services, Inc.

Western Center on Law and Poverty

David Pallack
Attorney for Petitioner

[No. B077282. Second Dist., Div. Four. Apr. 21, 1995.]

U.D. REGISTRY, INC., Plaintiff and Respondent, v.
THE STATE OF CALIFORNIA, Defendant;
RUTH CISNEROS, Intervener and Appellant.

[No. B077283. Second Dist., Div. Four. Apr. 21, 1995.]

APARTMENT ASSOCIATION OF GREATER LOS ANGELES,
Plaintiff and Respondent, v.
THE STATE OF CALIFORNIA, Defendant;
RUTH CISNEROS, Intervener and Appellant.

COUNSEL

San Fernando Valley Neighborhood Legal Services, Inc., David Pallack, Lew Hollman, Western Center on Law & Poverty, Richard Rothschild and Clare Pastore for Intervener and Appellant.

Sumner B. Cotton, Horvitz & Levy, Barry R. Levy, David M. Axelrad, Lisa Perrochet and Stephen L. Jones for Plaintiffs and Respondents.

No appearance for Defendant.

OPINION

EPSTEIN, J. – At issue in this case is "whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." (*Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 773 [48 L.Ed.2d 346,

365, 96 S.Ct. 1817].) We decide, as did the United States Supreme Court, that the answer is "no."

The tension here is between the First Amendment right to free speech and the Legislature's desire to protect prospective tenants by limiting the information a credit agency may report regarding a tenant's involvement in unlawful detainer actions. (Civ. Code, § 1785.13, subd. (a)(3); all statutory references are to this code unless otherwise stated.) The trial court found the statute unconstitutional, and we affirm that ruling.

Factual and Procedural Summary

The consolidated cases before us were tried on stipulated facts. Plaintiffs are the U.D. Registry, Inc. (UDR) and the Apartment Association of Greater Los Angeles (Apartment Association). The Apartment Association is a trade organization for members involved in the residential rental business. UDR gathers information regarding unlawful detainer cases from municipal and superior court files, and sells that information to subscribers, including the Apartment Association. Both plaintiffs are credit reporting agencies within the meaning of section 1785.13.

Section 1785.13, subdivision (a)(3), as amended effective January 1, 1992, provides that "No consumer credit reporting agency shall make any consumer credit report containing any of the following items of information: . . . [¶] (3) Unlawful detainer actions, unless the lessor was the prevailing party. For purposes of this paragraph, the lessor shall be deemed to be the prevailing party only if (A) final judgment was awarded to the

lessor (i) upon entry of the tenant's default, (ii) upon the granting of the lessor's motion for summary judgment, or (iii) following trial, or (B) the action was resolved by a written settlement agreement between the parties which states that the unlawful detainer action may be reported. In any other instance in which the action is resolved by settlement agreement, the lessor shall not be deemed to be the prevailing party for purposes of this paragraph."

Prior to the effective date of amended section 1785.13, it had been the practice of the Apartment Association, upon request by a member, to obtain unlawful detainer information from UDR regarding a prospective tenant and to provide that information to the member. The amendment to section 1785.13 made disclosure of such information by a credit reporting agency, and *only* by that form of business, unlawful.

UDR and the Apartment Association brought actions against the State of California challenging the validity of the amended statute and seeking to enjoin its enforcement. Injunctive relief was denied, and on appeal by the Apartment Association, Division Three of this court affirmed the denial in an unreported decision (*Apartment Association of Greater Los Angeles v. Lungren* (Dec. 14, 1992) B065163). Ruth Cisneros, a renter of housing in Los Angeles County who has been a defendant in unlawful detainer actions which were dismissed, was given leave to intervene in both actions. She is aligned with defendant State of California.

Following plaintiffs' unsuccessful motions for summary judgment, the two cases went to trial on stipulated facts. The court ruled that section 1785.13, subdivision

(a)(3) is unconstitutional because it prohibits truthful reporting of "information contained in court files that are fully available to the public and which can be freely reported and copied by any other person, entity or member of the media." Judgment was entered, and intervener Ruth Cisneros filed timely notices of appeal in both cases. Defendant State of California has not appeared in the appellate proceedings. The two cases have been consolidated for this appeal.

Discussion

We must first determine whether the speech in question is commercial or noncommercial speech. The distinction is important because, while both types of speech are protected under the First Amendment, " 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' [Citation.]" (*Board of Trustees, State Univ. of N.Y. v. Fox* (1989) 492 U.S. 469, 477 [106 L.Ed.2d 388, 401-402, 109 S.Ct. 3028].)

The test for identifying commercial speech is whether the expression at issue proposes a commercial transaction. (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. 748, 762 [48 L.Ed.2d 346, 358-359]; *Spiritual Psychic Science Church v. City of Azusa* (1985) 39 Cal.3d 501, 510-511 [217 Cal.Rptr. 225, 703 P.2d 1119].) Applying this settled definition, it is clear that the expression in this

case, truthful information[1] taken from public records regarding unlawful detainer defendants, does not propose a commercial transaction, and hence is not commercial speech. The fact that UDR sells the information does not transform it to commercial speech any more than the fact that a magazine or newspaper is sold makes its contents commercial speech. "Some of our most valued forms of fully protected speech are uttered for a profit." (*Board of Trustees, State Univ. of N.Y. v. Fox, supra,* 492 U.S. at p. 482 [106 L.Ed.2d at p. 405].)

The Supreme Court has considered the right to limit truthful reporting of legal proceedings in several cases. In *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469 [43 L.Ed.2d 328, 95 S.Ct. 1029], the court described the issue as: "whether the State may impose sanctions on the accurate publication of the name of a rape victim, obtained from public records – more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection." (*Id.* at p. 491 [43 L.Ed.2d at p. 347].) The court held the statutory limitation to be invalid. "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media." (*Id.* at p. 495 [43

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[1] We emphasize that this case concerns truthful speech, not false speech. (Cf. *Dun & Bradstreet, Inc. v. Greenmoss Builders* (1985) 472 U.S. 749 [86 L.Ed.2d 593, 105 S.Ct. 2939].)

L.Ed.2d at p. 349].) The court noted that "[i]f there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish. Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." (*Id.* at p. 496 [43 L.Ed.2d at p. 350], fn. omitted.)

In *Smith v. Daily Mail Publishing Co.* (1979) 443 U.S. 97 [61 L.Ed.2d 399, 99 S.Ct. 2667], the court held unconstitutional a West Virginia statute making it a crime for a newspaper to publish the name of any minor charged as a juvenile offender without the written approval of the juvenile court. Two newspapers learned of a shooting, allegedly perpetrated by a 14-year-old. They acquired this information by routine monitoring of the police band radio frequency. In violation of the statute, they published articles about the incident, including the alleged attacker's name, without seeking or obtaining approval from the juvenile court. The state sought to justify the statute as necessary to protect the anonymity of juvenile offenders because publication of their names might encourage further antisocial conduct and cause them to lose future employment or suffer other consequences for a single offense. The court held that the state's asserted interest was not sufficient to prevail over the constitutional rights created by the First Amendment. The court added that, even if the statute did serve a state interest of the highest order, the law did not accomplish its stated purpose since it did not restrict the electronic media or

any form of publication except newspapers from publishing the names of minors charged in a juvenile proceeding. (*Id.* at pp. 103-105 [61 L.Ed.2d at pp. 405-406].)

The court again considered "the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights" in *The Florida Star v. B.J.F.* (1989) 491 U.S. 524, 533 [105 L.Ed.2d 443, 455, 109 S.Ct. 2603]. In that case, a weekly newspaper published the name of a victim of a sexual assault which it had obtained from a publicly released police report. The paper was found civilly liable based on a Florida statute which made it unlawful to " 'print, publish, or broadcast . . . in any instrument of mass communication' " the name of a victim of a sexual offense. In overturning the statute, the court returned to its analysis in *Daily Mail,* in which it held: "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." (*Smith v. Daily Mail Publishing Co., supra,* 443 U.S. at p. 103 [61 L.Ed.2d at p. 405].)

The court first noted "the overarching ' "public interest, secured by the Constitution, in the dissemination of truth." ' [Citation.]" (*The Florida Star v. B.J.F., supra,* 491 U.S. at pp. 533-534 [105 L.Ed.2d at pp. 455-456].) It then relied on several other considerations, including the fact that protection is afforded only to publication of information that is lawfully obtained. "To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired. To the extent

sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release. The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination. Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts." (*The Florida Star v. B.J.F., supra,* 491 U.S. at p. 534 [105 L.Ed.2d at pp. 455-456].)

The court considered the fact that punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the state's asserted interest. "[W]here the government has made certain information publicly available, it is highly anomalous to sanction persons other than the source of its release." (*The Florida Star v. B.J.F., supra,* 491 U.S. at p. 535 [105 L.Ed.2d at p. 456].) The court also was concerned that self-censorship would result from a statute which punished the media for publishing certain truthful information. *(Ibid.)*

Among the flaws in the Florida statute was its facial underinclusiveness, which raised "serious doubts" about whether the statute was, in fact, serving the significant privacy interests the state invoked as justifying the limitation on speech. The statute prohibited the publication of identifying information in an " 'instrument of mass communication,' " but did not prohibit the spread of the information by any other means. "When a State attempts

the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant. . . . Without more careful and inclusive precautions against alternative forms of dissemination," the court was unable to conclude that the Florida ban satisfactorily accomplished its stated purpose.[2] (*The Florida Star v. B.J.F., supra,* 491 U.S. at pp. 540-541 [105 L.Ed.2d at pp. 459-460].)

These cases answer almost all the questions presented by our case. The information subject to the publication prohibition of section 1785.13, subdivision (a)(3) is lawfully obtained by UDR through its examination of court records which are open to public inspection. The parties have stipulated that UDR truthfully reports the information obtained from these records. (See *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. at pp. 495-496 [43 L.Ed.2d at pp. 349-350].)

Section 1785.13 is part of the Consumer Credit Reporting Agencies Act (tit. 1.6, § 1785.1, et seq.) That statute was enacted in 1975 "to require that consumer credit reporting agencies adopt reasonable procedures for

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[2] See also *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.* (1991) 502 U.S. 105 [116 L.Ed.2d 476, 112 S.Ct. 501] (statute that imposes financial burden on speaker because of speech content is presumptively unconstitutional); *R.A.V. v. St. Paul* (1992) ___ U.S. ___ [120 L.Ed.2d 305, 112 S.Ct. 2538] ("hate crime" ordinance unconstitutionally underinclusive because coverage limited to speakers who express views on disfavored subjects).

meeting the needs of commerce for consumer credit, personnel, insurance, hiring of a dwelling unit, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title." (§ 1785.1, subd. (d).) Section 1785.13 limits the information which a consumer credit reporting agency can report, precluding reports of bankruptcies, lawsuits, satisfied and unsatisfied judgments, tax liens, criminal records or other adverse information if any of those events antedate the report by a certain number of years.

Section 1785.13, subdivision (a)(4) originally provided that a consumer credit reporting agency could not report "Unlawful detainer actions where the person against whom the action was filed was adjudged the prevailing party." It was amended in 1991 (Assem. Bill No. 1796) so that subdivision (a)(3) precluded the reporting of unlawful detainer actions "unless the lessor was the prevailing party." The report of the Senate Committee on Judiciary stated that the purpose of the bill "is to prevent a meritless eviction lawsuit from being included in a consumer credit report." The report includes the statement of the bill's sponsor that this amendment was necessary because existing restrictions on the use of information concerning a tenant's involvement in an unlawful detainer action were inadequate. Under then existing law, unlawful detainer information could not be included in a credit report when the tenant was adjudged the prevailing party, but it could be included if the eviction action was settled or the matter was dismissed by the landlord. "[I]nappropriate inclusion of information about

unlawful detainer actions results in 'tenant blacklisting' and imposes an unfair and unnecessary hardship on tenants seeking rental housing."

Concern about the availability of rental housing for those needing housing, and particularly those facing eviction, is a valid and significant state interest. But it does not justify a ban on publication by credit reporting agencies of lawfully obtained truthful information contained in court records open to the perusal of everyone. The information is in the custody of the state. If the state is concerned about dissemination of this information, it has the power to control its initial release. As explained in *Florida Star, supra,* the government may classify the information, establish procedures for its redacted release, and extend a damages remedy against the government if the government's mishandling of sensitive information leads to its dissemination. "Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts." (491 U.S. at p. 534 [105 L.Ed.2d at pp. 455-456].)

Section 1785.13, subdivision (a)(3) contains the same flaw found in the *Daily Mail* and *Florida Star* cases – the restriction against dissemination is limited to one type of publication, thereby failing to achieve its purpose of protecting the subject from other modes of broadcast of the same information. In *Daily Mail,* the restriction applied only to newspapers; in *Florida Star,* it applied only to "any instrument of mass communication"; in our case, the restriction applies only to consumer credit reporting agencies. In all three instances, the information can be disseminated in countless other ways. No justification is

advanced for limiting one form of dissemination while permitting broadcast of the same information by other methods.

Appellant argues that the Supreme Court cases we have discussed are inapposite because they deal with information of public significance, while a credit report is a matter of private interest between the speaker and its business audience. The view that credit reports involve a matter of only private concern is expressed in various ways in the plurality opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, supra,* 472 U.S. 749, a defamation case arising from an erroneous credit report of a bankruptcy filing. While the distinction may be significant in the area of defamation, it does not define the parameters of permissible regulation for truthful reporting.

Section 1785.13, subdivision (a)(3) seeks to limit the free flow of information for fear of its misuse by landlords. The Supreme Court addressed just such a situation in the context of commercial speech in the *Va. Pharmacy* case when it rejected Virginia's claim that the only way it could enable its citizens to act in their own best interests is to keep them from obtaining comparative price information: "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." (*Va. Pharmacy Bd. v. Va. Consumer*

Council, supra, 425 U.S. 748, 769-770 [48 L.Ed.2d 346, 362-363]; *Linmark Associates, Inc. v. Willingboro* (1977) 431 U.S. 85, 96-97 [52 L.Ed.2d 155, 164-165, 97 S.Ct. 1614].)

If such a "paternalistic approach" is impermissible for commercial speech, it is certainly improper for more highly protected noncommercial speech such as that limited by section 1785.13, subdivision (a)(3). The state can, and does, provide the means to "open the channels of communication" by affording the consumer the right to dispute inaccurate information in a credit report, seek a reinvestigation of the accuracy of information, and provide a brief statement explaining any unresolved disputed information to be included in any credit report the agency issues about the consumer. (§ 1785.15, subd. (f).) In this way, the state's concerns regarding the effect of the information upon its recipients are served without violation of the First Amendment.

As suggested by several of the opinions we have discussed, there are any number of things the state may lawfully do to protect renters who are subject to or who have suffered an eviction. What it cannot do is to act in violation of the Constitution. That is the effect of section 1785.13, subdivision (a)(3), the statute before us. We conclude it violates the First Amendment, and therefore is unconstitutional. The trial court was right to so declare.

DISPOSITION

The judgment is affirmed.

Woods (A. M.), P. J., and Vogel (C. S.), J., concurred.

Second Appellate District, Division Four,
No. B077282/B077283
S046852

IN THE SUPREME COURT OF CALIFORNIA

IN BANK

U.D. REGISTRY, INC., Respondent

v.

THE STATE OF CALIFORNIA, Defendant
RUTH CISNEROS, Appellant
and consolidated case

(Filed Aug. 17, 1995)

Appellant's petition for review DENIED.

Lucas, C.J. and George, J. are of the opinion the petition should be granted.

LUCAS
Chief Justice

STEPHEN L. JONES
State Bar No. 071383
725 South Figueroa Street
Suite 1200
Los Angeles, CA 90017-2513

(213) 488-7180

Attorney for Plaintiff
The Apartment Association of
Greater Los Angeles

Original filed
2/3/93

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

THE APARTMENT ASSOCIATION OF GREATER LOS ANGELES, Plaintiff, vs. DANIEL E. LUNGREN, et al., Defendants. RUTH CISNEROS, Intervenor.	CASE NO. BC 044 662 (Related to BC 044 054) FACTUAL STIPULATION FOR TRIAL TRIAL: DATE: FEBRUARY 3, 1993 TIME: 8:30 A.M. DEPT: 1

The parties, by and through their respective counsel of record, in order to expedite the trial and for the convenience of the court, hereby stipulate to the following facts for the purposes of trial in this matter:

1. On September 17, 1991, the Legislature of the State of California voted in favor of Assembly Bill 1796 ("AB 1796"), which amended Section 1785.13 of the California Civil Code. On October 13, 1991, the Governor of the State of California signed AB 1796 which became effective January 1, 1992.

2. A true and correct copy of AB 1796 is attached hereto as Exhibit A.

3. A true and correct copy of Section 1785.13 of the California Civil Code as it existed prior to the amendment by AB 1796 is attached hereto as Exhibit B.

4. Section 1785.13 may be enforced, *inter alia*, by aggrieved individuals through private litigation as authorized in Section 1785.31, a true and correct copy of which is attached hereto as Exhibit C.

5. Municipal and Superior Court files of unlawful detainer cases are generally made available for public review although some courts impose restrictions on the time for view or the number of files available for review.

6. Plaintiff Apartment Association of Greater Los Angeles (the "Apartment Association") is a trade organization with approximately 27,000 members who are involved or interested in the residential rental business primarily in the County of Los Angeles, California.

7. The Apartment Association is a California nonprofit mutual benefit corporation founded in 1917.

8. In 1991, the Apartment Association provided to members upon their request approximately 125,000 reports regarding unlawful detainer cases against individuals.

9. As a result of its provision of such unlawful detainer case information to its members, the Apartment Association is a credit reporting agency within the meaning of that term as used in Sections 1785.3 *et seq.* of the Civil Code.

10. A credit report, typical in format, provided by the Apartment Association to a requesting member prior to January 1, 1992, in those instances where there has been one or more unlawful detainer cases filed against the individual, is attached hereto as Exhibit D (identification of the particular individual has been deleted from the exhibit). The comments about "misused ID" in Exhibit D are general comments contained in the reports and are not related to the particular tenant(s) who are the subject of the report.

11. The Apartment Association obtained, and continues to obtain, all of the information regarding unlawful detainer cases which it provides to its members from the U.D. Registry, Inc. ("UDR").

12. The UDR obtained, and continues to obtain, all of the information regarding unlawful detainer cases which it provided, and currently provides, to the Apartment Association from Municipal and Superior Court files which are made available by the clerks of the courts to, and reviewed by, persons employed by or agents of the UDR.

13. Prior to January 1, 1992, the Apartment Association provided to its members consumer credit reports which contained information the disclosure of which has now been made unlawful by the amendment to Section 1785.13 of the California Civil Code contained in AB 1796. The Apartment Association desires to provide certain information to its members the disclosure of which has now been made unlawful by the amendment to Section 1785.13 of the California Civil Code contained in AB 1796.

14. The Apartment Association has been prevented from providing such information to its members by the provisions of Section 1785.13 of the California Civil Code, as it was amended by AB 1796.

15. A significant number of members of the Apartment Association have utilized, and desire to continue utilizing, the information obtained from the reports of unlawful detainer cases to determine or help determine the qualifications of prospective tenants.

16. A significant number of members of the Apartment Association desire to receive certain information about unlawful detainer cases the disclosure of which has now been made unlawful by the amendment to Section 1785.13 of the California Civil Code contained in AB 1796.

17. A significant number of unlawful detainer cases would, if tried, result in a judgment for the landlord but are not prosecuted or are dismissed without going to judgment after the tenant pays the past due rent or vacates the premises.

18. A significant number of unlawful detainer cases would, if tried, result in a judgment for the tenant but are dismissed, settled, or not prosecuted.

19. Attached hereto as Exhibit E is a true and correct copy of a report by the Senate Committee on Judiciary generated in connection with the Legislature's consideration of AB 1796.

20. The UDR is a consumer credit reporting agency governed by the California Consumer Credit Report Agencies Act (Civil Code §§ 1785.1 to 1785.35). The UDR calls itself a "tenant screening agency."

21. The UDR is a California for-profit corporation. It was founded and began its business in 1977.

22. One service the UDR offers to its users is a "U.D. report." A U.D. report contains certain items of information about unlawful detainer cases, if any, filed against an individual. The UDR sells its U.D. reports for monetary fees.

23. Typically, a landlord-user of the UDR purchases a U.D. report about a prospective tenant who has applied to rent housing from that landlord. The landlord-user uses that report to determine or help determine whether to rent to that prospective tenant.

24. A significant number of landlords who use the UDR have a policy of rejecting a prospective tenant for housing if that tenant has been involved in an unlawful detainer case, whether the case went to judgment or was dismissed, settled or unresolved.

25. The Apartment Association subscribes to the UDR. One service the Apartment Association performs

for its landlord members is to purchase a U.D. report from the UDR and convey that report to the member who requested it.

26. Intervenor is a single mother with two minor daughters. She is a citizen of the State of California and a resident of the County of Los Angeles. Intervenor has been a renter in Los Angeles County for fifteen years.

27. Intervenor was the defendant in three eviction actions which were dismissed. She remained a tenant in good standing after each case was dismissed.

28. Prior to January 1, 1992, the UDR issued a report about intervenor to a prospective landlord which contained information about the three eviction cases filed against her. AB 1796 now prohibits reports of those dismissed eviction actions, except under the circumstances described in Civil Code §1785.13(b).

29. The UDR desires to resume providing information to its clients which has been made unlawful by the amendments to Section 1785.13 of the California Civil Code contained in AB 1796.

30. Attached as Exhibits F and G are true and correct copies of letters which are contained in the files of the California Legislature. The parties stipulate that each such exhibit is contained in such files and was placed there in the ordinary course of business in connection with the Legislature's consideration of AB 1796.

31. Attached as Exhibit H is a true and correct copy of a letter received by the Office of Governor Pete Wilson on or about October 1, 1991. The parties stipulate that

such letter was received by the Office of Governor Wilson on or about such date.

32. Attached as Exhibit I is a true and correct copy of a release prepared by the UDR and distributed to some of its clients. The parties stipulate to the authenticity of this document.

33. Attached, for the Court's convenience, is a true and correct copy of the ruling in this action by the California Court of Appeal on December 14, 1992.

The parties, and each of them, hereto stipulate to the foregoing facts and to the admissibility of the documents identified as Exhibits A through E hereto in both this action and in the action, *U.D. Registry v. State of California*, Los Angeles Superior Court Case No. BC 044 054.

The parties, and each of them, reserve the right to object to the admissibility of Exhibits F, G, H and I on the grounds of relevance, competency, hearsay and, other than as stipulated herein, lack of foundation.

All parties reserve the right to object to the relevance of any facts or exhibits set forth herein. The stipulations contained herein are for the purposes of, and limited to, this action only and are not to be used for any other purpose.

The foregoing facts and documents are all of the facts, exclusive of code sections, judicial determinations and other matters of which the court may take judicial notice, desired by the parties, and each of them, to be introduced into evidence in this action or in the action, *U.D. Registry v. State of California*, Los Angeles Superior Court Case No. BC 044 054.

Dated: 1/27/93

Plaintiff Apartment Association of Greater Los Angeles

By /s/ Stephen L. Jones
Stephen L. Jones
Attorney for Plaintiff
Apartment Association

Dated: 1-27-93

Defendants Daniel Lungren and The State of California

By /s/ Christopher C. Foley
Christopher C. Foley,
Deputy Attorney General
Attorney General for the
State of California
representing Daniel
Lungren and The State
of California

Dated: 1/27/93

Intervenor Ruth Cisneros

By /s/ David Pallack
David Pallack
Attorney for Intervenor
Ruth Cisneros

Dated:

Plaintiff U.D. Registry

By /s/ Sumner Bennett Cotton
Sumner Bennett Cotton
Attorney for Plaintiff
U.D. Registry, Inc.

EXHIBIT A

Assembly Bill No. 1796,
amending Civil Code § 1785.13(a)(3)
[Omitted In Printing]

EXHIBIT B

Former Civil Code § 1785.13(a)(3)
[Omitted In Printing]

EXHIBIT C

Civil Code § 1785.31
[Omitted In Printing]

EXHIBIT D

****** Welcome to our Automated Service. Hours of access are:******Mon thru Fri 5:30 AM to 10:00 PM – Sat & Sun 5:30 AM to 6:00 PM******Call the automation division in the business office for assistance***

UDR Inq #022043-04 PC Inq # Transaction #

Confidential report requested by AAGLA
WARNING: This UD report from THE U.D. REGISTRY, INC. is CONFIDENTIAL. Its possession and use are controlled by law. Do not reveal its contents to any other person, especially your applicant.

Report on: 10/18/91 11:54:35
SSN DOB/AGE DL#
[Digits Blacked Out]-21-4456
[Last Name Blacked Out], ISMAEL
BERTHA

Current Address:

**PRIOR INQUIRIES WITH SAME I.D. **
CAUTION: Because of misused I.D. the listed inquiries may not be your applicant. Consider re-running other names used by your applicant in the past.

12/26/90 1DIANE ROBBINS (714) 355-2122
[Last Name Blacked Out], ISMAEL & BERTHA

15709 ATGLEN HACIENDA HEIGHTS 2700 AZUSA WEST COVINA

** I.D. MATCH **

CAUTION: Because of misused I.D. the listed cases may not be your applicant.

Court: 108 CITRUS – MUNIC Filed: 02/12/87 Case # [Case Number Blacked Out]

Case type: Unlawful Detainer Notice type: 3R

Defendants: [Last Name Blacked Out], ISMAEL
[Last Name Blacked Out], BERTHA
MARTINEZ, JOVITA [Digits Blacked Out]-21-4456

Plaintiff: CONTINENTAL VILLAGE LTD Telephone:
Judgment: for: $0 Paid: $0

Case Dismissed

Address: 2700 S AZUSA, WEST COVINA, CA

Court: 108 CITRUS – MUNIC Filed: 10/12/88 Case # [Case Number Blacked Out]

Case type: Unlawful Detainer Notice type: 3R

Defendants: [Last Name Blacked Out], ISMAEL
[Last Name Blacked Out], BERTHA
[Digits Blacked Out]-21-4456

Plaintiff: CONTINENTAL VILLAGE LTD Telephone:
Judgment: for: $0 Paid: $0

Address: 2700 S AZUSA, WEST COVINA, CA

Comments:

End of UD Report

EXHIBIT E

SENATE COMMITTEE ON JUDICIARY
Bill Lockyer, Chairman
1991-92 Regular Session

AB 1796 (Friedman)
As amended May 20
Hearing date: July 2, 1991
Civil Code
JRP

CREDIT REPORTING: UNLAWFUL DETAINERS

HISTORY

Source: Bet Tzedek Legal Services

Prior Legislation:
AB 2211 (1986) – Died in Assembly Judiciary
AB 3180 (1986) – Vetoed by the Governor

Support: TRW; Consumer's Union; Asian Law Alliance; National Consumer Law Center; Voluntary Legal Services Program of Northern California; Western Center on Law and Poverty; San Fernando Valley Legal Services, Inc.; City of West Hollywood; California Rural Legal Assistance Foundation

Opposition: California Association of Realtors; California Apartment Association

Assembly Floor vote: Ayes 42 – Noes 30

KEY ISSUE

SHOULD CREDIT AGENCIES BE PROHIBITED FROM GIVING OUT INFORMATION CONCERNING EVICTION ACTIONS UNLESS THE LANDLORD WAS THE PREVAILING PARTY IN THE ACTION?

PURPOSE

Existing law prohibits consumer credit reporting agencies from including information about an unlawful detainer action in their credit reports where the the tenant was adjudged to be the prevailing party in the action or when the judgment in the action is more than seven years old.

Existing case law provides that a tenant is adjudged to be the prevailing party only if he or she prevails on a motion for summary judgment or at trial. Therefore, information may be included regarding the eviction even if the case is dismissed or is resolved through an out an out-of-court settlement in the tenant's favor.

This bill revises the prohibition against including information about unlawful detainer actions in consumer credit reports by prohibiting inclusion of information about an unlawful detainer action unless the landlord was the prevailing party.

The bill provides that the landlord shall be deemed a prevailing party only 1) if the final judgment was awarded to the landlord upon the tenant's default, upon the landlord's motion for summary judgment, or following trial or, 2) the action was settled in favor of the lessor and the settlement agreement states that the unlawful detainer action may be reported.

The purpose of this bill is to prevent a meritless eviction lawsuit from being included in a consumer credit report.

COMMENT

1. Background

Over the past several years, legal services and consumer protection groups have complained that existing restrictions on the use of information concerning a tenant's involvement in an unlawful detainer action (eviction action) is inadequate. They point out that while the law prohibits inclusion of such information when the tenant is adjudged to be the prevailing party, it fails to exclude such information when the eviction action is settled or the matter is dismissed by the landlord.

The sponsor states that inappropriate inclusion of information about unlawful detainer actions results in "tenant blacklisting" and imposes an unfair and unnecessary hardship on tenants seeking rental housing.

According to the sponsor, tenants against whom meritless eviction lawsuits are filed find themselves listed as bad credit risks on reports circulated to lessors and their agents, even though these tenants are not evicted. The only way such tenants can avoid the stigma of the Tenant Screening Agency (TSA) is to win a court judgment against their landlord. The sponsor states that often, however, cases are filed against upstanding tenants who settle out of court – leaving blameless tenants with bad credit ratings.

One example of the impact of current reporting practices involved a disabled man who lived independently but needed the services of an attendant. He received an eviction notice after hiring an attendant who happened to be black. The landlord told the tenant that she was evicting him because she didn't want black people around her apartments. The unlawful detainer action was settled out-of-court

with the tenant permitted to continue his tenancy and the landlord required to pay $5,000 in damages for discrimination. However, when the tenant attempted to move to a new home several months later, he was denied a rental because the unlawful detainer had resulted in a negative credit report from a TSA.

This bill would address the above problem by permitting unlawful detainer actions to be reported only in those cases where the plaintiff is the prevailing party.

2. Standard credit practices

According to TRW, the general standard of the credit industry is to report court actions on a consumer credit report only upon the entry of judgment and not to report the mere filing of lawsuits.

The above policy is based on the premise that until a judgment is entered against a consumer, any information regarding a pending lawsuit is so inherently prejudicial and inflammatory that it should be unreportable.

The sponsor states that given that the practice of reporting mere filings is unfair in the traditional credit context (i.e. when the consumer is seeking a loan), it is certainly unfair in the rental housing context where consumers are seeking a roof over their heads.

According to the sponsor, this bill will pull the TSA industry up to the standard maintained by mainstream credit reporting industries.

3. Previous legislation

In 1986, Assemblyman Roos introduced AB 2211 and AB 3180. These bills sought to (1) further regulate agencies that gathered and distributed information used to screen tenants and (2) specifically limit the circumstances in which information about unlawful

detainer actions could be included in such reports. AB 2211 died in the Assembly Judiciary Committee. AB 3180 was vetoed by the Governor.

4. Arguments in support of the bill

Supporters of the bill argue that credit reports should only contain information about unlawful detainer actions when a landlord obtains a final judgment in the action. Further, they argue that the inclusion of information about unlawful detainer filing in consumer credit reports:

a) Is often misleading and may cause the users of such reports to draw unfair conclusions about a tenant. They point out that the mere filing of a court complaint does not establish the truth of the matter and, at best, reflects one side of a dispute.

b) Can result in exclusion of a tenant from adequate housing or any housing at all. They contend "a prospective landlord choosing between two applicants, one with a report of an unlawful detainer filing and one with no such report, will understandably choose the one with no reports." They also suggest that in a tight housing market, the consumer report "becomes a blacklist – unfairly excluding people from the housing regardless of the truth."

c) Discourages the use of negotiation and settlement to resolve disputes once the unlawful detainer is filed. They suggest that even when the landlord and tenant agree that a case should be dismissed, the tenant may feel compelled to litigate and obtain a court judgment in order to avoid negative information from appearing on his or her credit history.

5. Arguments in opposition to the bill

The California Association of Realtors is opposed to this bill. They argue that this bill would seriously restrict the availability of relevant information concerning prospective residents of rental property. They state that because unlawful detainers are no longer a quick and expeditious process to terminate a tenancy, relevant information concerning potential residents is important.

According to CAR the need for adequate information is greater for this form of an extension of credit than for most any other credit related transaction because of the need for judicial action to terminate the daily extension of such credit.

The California Apartment Association states that the bill would significantly inhibit the access of relevant information about prospective residents. They believe that this bill will deprive landlords of relevant information in determining to whom to let an apartment.

CAA states that the current prohibition against reporting unlawful detainers where the tenant has been adjudged to be the prevailing party is adequate protection.

[LOGO]

EXHIBIT F

JUL. 2, 1991

TRW, Inc.
Executive Offices
One Space Park
Redondo Beach, CA 90278
213-812-4691

June 27, 1991

The Honorable Bill Lockyer
Chairman
Senate Judiciary Committee
California State Capitol
Sacramento, CA 95814

Subject: AB 1796 (Friedman)

Dear Senator Lockyer:

TRW supports AB 1796 which would prohibit consumer credit reports from including an item of information on an unlawful detainer action unless the lessor was judged the prevailing party or where a settlement agreement allows for the reporting of the action.

We believe this measure provides a level of protection for tenants by ensuring that unlawful detainer actions are included in credit file data only when the landlord prevails – not when actions are merely filed by them in court. Not only will this provide a new level of protection for individuals, but it will actually preserve the integrity of TRW's credit file data base by making sure that information reported into our consumer credit files every month accurately reflects the status of the action, whether it be credit payment information or court judgements and

settlements. I cannot emphasize how important this is for consumers and credit grantors who need accurate credit data for entering into credit relationships, as well as for the consumer credit reporting industry which is dependent upon credit file accuracy in order to survive in the market place.

As the nation's largest consumer credit reporting agency, TRW supports measures like AB 1796 which improve the credit reporting process for consumers and individuals involved in tenant/landlord disputes. For this reason we urge you and your colleagues to pass this bill when it comes before you on July 2.

Sincerely,

/s/ Michael Jackson
Michael Jackson
Regional Manager
State & Constituent Relations

cc: Members, Senate Judiciary Committee
Assemblyman Terry Friedman
Ken Donney, Bet Tzedek Legal Services

EXHIBIT G

(LOGO)

CALIFORNIA APARTMENT ASSOCIATION

APR. 23, 1991

April 22, 1991

The Honorable Terry Friedman
California State Assembly
4117 State Capitol
Sacramento, CA 95814

Re: OPPOSITION – AB 1796

Dear Assemblymember Friedman:

The California Apartment Association (CAA) must oppose AB 1796. CAA is a federation of 25 local affiliate apartment associations throughout the State representing over 25,000 rental property owners the majority of whom own 8-12 rental units.

AB 1796 would prohibit the reporting of unlawful detainer filings by consumer reporting agencies unless and until a judgment for the property owner has been won or obtained. The great majority of unlawful detainer cases are not answered because they are based upon nonpayment of rent and by the time the answer is due and a default is taken, a tenant has moved out or is in the process of doing so. by prohibiting consumer credit reporting agencies from reporting the filing of these cases, the rental property owner who provides the next housing for this tenant will not be privy to the fact that the tenant was a defendant in an unlawful detainer suit, a relevant factor in determining to whom to let an apartment unit. We believe that the current prohibition against

reporting unlawful detainer actions where the tenant has been adjudged the prevailing party is adequate to ensure both tenants and rental property owners are protected.

If you have any questions regarding our opposition, we would be happy to meet with you at your convenience.

Respectfully,

CALIFORNIA APARTMENT ASSOCIATION

By: /s/ Donna Campbell
Donna May Campbell
Legislative Counsel
cc: Assembly Judiciary Committee

EXHIBIT H

[SEAL] SACRAMENTO MUNICIPAL
COURT DISTRICT

Sacramento County Courthouse
720 Ninth Street
Sacramento, California 95814

GAIL D. OHANESIAN *(916) 440-6385*
Presiding Judge

September 27, 1991

Honorable Pete Wilson
Governor
State of California
State Capitol Building
Sacramento, CA 95814

RE: AB 1796 (Friedman)

Dear Governor Wilson:

I have been asked to comment on the above legislation regarding credit reporting of Unlawful Detainer lawsuits.

Under existing law, if a landlord files an Unlawful Detainer action against a tenant, this information can be included on the tenant's credit report unless the tenant is determined to be the prevailing party. There is no basis for determining who is the prevailing party unless the lawsuit proceeds to trial and judgment is rendered against one side or the other. Thus, if the lawsuit is voluntarily dismissed by the landlord or if the lawsuit is settled without any judicial determination of who is the prevailing party, the fact of the lawsuit may still appear as a negative mark on the tenant's credit report. This is

fundamentally unfair to parties who have a legitimate defense to the lawsuit based on which a landlord voluntarily agrees to dismiss or settle the case.

Moreover, the current law discourages out-of-court settlements in such cases. As such, it is contrary to public policy which favors resolving disputes outside of court and it unnecessarily contributes to the over-congestion of our courts. Unlawful Detainer cases are routinely heard in the Municipal Court on a daily basis. Given he press of criminal cases and our limited resources, it is simply not possible to provide a trial for every Unlawful Detainer case filed. We rely therefore on a large number of these Unlawful Detainer cases settling on the day of trial. As there is no trial in these cases, there is no basis for making a determination as to who is the prevailing party. Yet for credit reporting purposes, the fact that the lawsuit was filed will be a black mark on the tenant's credit record. It may well be that the tenant had a legitimate dispute with the landlord, but the relationship between them has deteriorated to such an extent that the tenant simply agrees to move out and on those terms the landlord agrees to settle the case. Again, since there has been no trial, there is no basis for making a determination as to who is the prevailing party. Yet under current law, the fact of the lawsuit will still go against the tenant's credit rating. This actually is counterproductive from a landlord's point of view since any such report might make it more difficult for the tenant to find another home. Where a term of a settlement provides that the tenant vacate the premises within a time certain, any impediment to the tenant being able to do this does not help the landlord since at that point the tenant can, under the law, submit a request for further time to move.

For those concerned that this legislation might make it possible for "deadbeat" tenants to avoid having their poor credit history reported, I would say that is not a problem. The vast majority of settlements reached in this court provide that upon the tenant's failure to comply with the terms of a settlement a judgment will be entered. At this point in time, under the proposed legislation (Sec. 1785.13(a) (3)), the action can be reported.

Accordingly, I believe that by changing the law to allow credit reporting of Unlawful Detainer cases only when the landlord has been determined to be the prevailing party, AB 1796 represents a fair and intelligent way of handling this matter. This legislation has the potential for improving the administration of justice, reducing the trial caseload, and giving fair treatment to landlords and tenants. If you have any questions about this matter or you with to discuss it with a member of the bench, please feel free to have a member of your staff call Judge Alice A. Lytle, who is the assignment Judge on the Unlawful Detainer calendar. She will be pleased to be of assistance.

Thank you for your kind attention.

Sincerely,

/s/ Gail D. Ohanesian
Gail D. Ohanesian, Presiding Judge
Sacramento Municipal Court

cc: Assemblyman Terry Freidman
Judge Alice A. Lytle
Barrie J. Roberts, Esq.
Judicial Officers
Dennis H. Jones, Clerk/Administrator

EXHIBIT I

THE U.D. REGISTRY, INC.
P.O. Box 9140
Van Nuys, California 91409-9140

Northern California
(800) 464-1007

Los Angeles and Vicinity
(213) 873-5014 (818) 785-4025

Southern California
(800) 321-7803

To all UDR members:

This is to clear some confusion and to further explain the new law (AB1796) and how UDR is responding to it.

If there is an eviction case UDR can lawfully report, you will receive the full report just as you had in the past.

If there is an eviction case that can not be reported, UDR will not report it. HOWEVER, it is lawful for UDR to give its opinion as to whether you should accept or reject an applicant.

Since it is the overwhelming policy of UDR members to reject anyone if they have been involved in an eviction case, UDR has adopted that standard for its decisions.

Therefore, if UDR sees an eviction case that can not be reported, rather than not tell you anything at all, UDR will inform you of its decision to REJECT THIS APPLICANT.

It is hoped this follow-up letter will clear up any confusion in what we are doing and why. If you have managers who do not receive this letter, please pass on this information to them.

We feel helpless when we give our REJECT decision and the person we are speaking with doesn't understand what we are saying or why.

Again, UDR has a lawsuit against the State of California to have this law declared unconstitutional, but until it is, UDR will abide by it and still service its members in the best way possible. If the law were to be violated by UDR, UDR would be subject to suit, and much worse, so will the user of the information. We do not intend to subject our membership to possible lawsuits.

If you need further help with this matter, please call Harvey at the business office.

We would like to thank our many friends who have contributed to our legal fight with the State. For those of you who have not yet done so, your contribution would be greatly appreciated. You can still mail your contributions, made payable to UDR FOR LANDLORD RIGHTS, to:

UDR for Landlord Rights
P.O Box 9140
Van Nuys, Ca. 91409

Thank you.

Unpublished Court of Appeal Decision
Affirming Denial of Preliminary Injunction
[Omitted In Printing]

(2)

No. 95-776

Supreme Court, U.S.
FILED
DEC 6 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

RUTH CISNEROS,

Petitioner,

v.

THE U.D. REGISTRY, INC., THE APARTMENT ASSOCIATION OF GREATER LOS ANGELES,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN L. JONES*
445 South Figueroa Street
Suite 2600
Los Angeles, CA 90071
Telephone (213) 612-7701

*Counsel of Record
for Respondent Apartment
Association of Greater
Los Angeles

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19PP

PARTIES BELOW

Respondent respectfully disagrees with Petitioner's characterization that the State of California and Daniel E. Lungren, as Attorney General of California, were not parties to the appellate proceedings. While they did not actively participate, they were parties. In fact, the Court of Appeal's decision identifies them as defendants. As stated in the decision, there merely was "No appearance for defendant" before the Court of Appeal. Petition at page 1a.

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CALIFORNIA STATUTES

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Apartment Association of Greater Los Angeles ("Respondent") hereby responds to the Petition for Writ of Certiorari ("Petition") filed by Petitioner Ruth Cisneros ("Petitioner"). Respondent respectfully requests that this Court deny the Petition.

Review by this Court is unnecessary because (a) the decision of the California Court of Appeal[1] does not conflict with any decision of any other state court of last resort or of a United States court of appeals, and (b) the issue resolved by the California Court of Appeal does not conflict with any decision of this Court but rather, as found by the California Court of Appeal, was dictated by this Court's previous decisions.[2]

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[1] The opinion of the California Court of Appeal is reported at 34 Cal. App. 4th 107, 40 Cal. Rptr. 2d 228 (1995). A copy is included as an appendix to the Petition.

[2] *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979); *The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989). *See, also, United States v. Aguilar*, ___ U.S. ___, 115 S.Ct. 2357, 2365, ___ L.Ed.2d ___ (1995) ("It is true that the government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a "state interest of the highest order.").

I. RESPONSES TO "QUESTIONS PRESENTED" BY PETITIONER.

Respondent briefly responds to Petitioner's "Questions Presented" as they have been specifically framed by her. Respondent will, *infra*, provide responses in greater detail to the actual arguments presented in the Petition.

A. Petitioner's Question No. 1.

> Whether a state Legislature may, consistent with the First Amendment, exclude from credit reports information concerning eviction actions that tenants have won or that are pending, settled or dismissed, when the Legislature concludes that inclusion of such information results in the unfair denial of housing to prospective tenants.

Response To Petitioner's Question No. 1.

First, the reports involved here are scarcely "credit reports" as that term is commonly understood. The reports contain no confidential information culled from bank accounts, credit card balances, loan payments, or interviews with neighbors. They are merely compilations of information from publicly-available court files in the California Municipal and Superior Courts involving unlawful detainer actions. The reports do not even contain any information regarding the particular allegations made in the actions. They report only the existence of the legal action and its resolution, if any. Thus, any judicial determination of the First Amendment protections accorded to these types of reports would not necessarily

apply to usual "credit reports." Use of the term "credit reports" in the "Question Presented" to describe the reports herein is overbroad.

To avoid confusion, Respondent will hereafter refer to the reports at issue here as "tenant screening reports."

Second, the Question Presented is factually in error as the California Legislature did not "conclude that inclusion of such information results in the unfair denial of housing to prospective tenants." The only statement of purpose adopted by the California Legislature in connection with the Statute was that "[t]he purpose of this bill is to prevent a meritless eviction lawsuit from being included in a consumer credit report."[3] The statement referenced by Petitioner in her "Question Presented" is contained only in a section of the legislative report wherein the report recites, without adopting, the arguments presented by others in favor and against the Statute.

Finally, the Question Presented as phrased discloses an alternate ground for the decision which could prevent this Court from reaching the issues presented by Petitioner. In the defense of the statute[4] Petitioner and the State of California have relied solely upon the presumptions of constitutionality and correctness given to ordinary legislation. However, as discussed *infra*, legislation

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[3] Petition at page 27a. A prohibition of the reporting of all unlawful detainer actions to accomplish the purpose of preventing the reporting of a few meritless actions is hopelessly overbroad and is not reasonably tailored to accomplish its purpose.

[4] California Civil Code § 1785.13(a)(3) (hereinafter the "Statute").

imposing restraints on free speech is not accorded such legislative deference and, instead, the burden of proof is on those defending the legislation to affirmatively show facts supporting the elements required by this Court for lawful restraints on speech. Neither Petitioner nor the State of California have presented any of this required evidence. Their failure to do so is reflected in the particular wording of this Question.

This defect in Petitioner's case was not a factor in the decision below, as the California Court of Appeal found the Statute unconstitutional on substantive grounds rather than on the absence of the required proof by Petitioner and the State of California. However, any review by this Court for the purpose of anything more than affirming the ruling of the court below would necessarily involve, and be determined by, this absence of evidence.

B. Petitioner's Question No. 2.

> Whether private consumer credit reports receive full First Amendment protection like that accorded "robust debate on public issues," or whether they receive intermediate First Amendment scrutiny like that accorded commercial speech or speech on matters of private concern.

Response to Question No. 2.

In the phrasing of this Question, Petitioner has merged three separate First Amendment doctrines, two of which are not raised in this action.

First, the "robust debate on public issues" doctrine arises in cases of false speech where the Court must balance the harm arising from the false speech with the breathing space to be accorded false speech made in the heat of public debate.[5] The doctrine is based on the concept that uninhibited, robust debate often includes statements which, upon more careful reflection, may not have been entirely truthful. The doctrine has no application to the truthful speech involved herein.

Second, the "speech on matters of private concerns" has been applied only to cases involving issues not raised herein. This case does not, for example, involve false speech (where the issue of "private concern" is considered in the determination of the public debate value of the false speech) or governmental employment (where the issue of "private concern" is considered in the determination of whether a government employee may constitutionally be disciplined for speech deemed harmful to the purposes of his or her governmental employment). The arguments submitted by Petitioners urging the use of the "private concern" theory rely solely on judicial decisions involving either one or the other of these two irrelevant subissues.

II. JURISDICTION.

This case may raise a jurisdictional issue regarding the application of the doctrine of independent state law

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[5] *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

grounds. In this action, Respondent challenged the constitutionality of the Statute on both federal and state constitutional grounds. However, the decision of the California Court of Appeal was silent as to the separate effect of Article 1, section 2(a) of the California Constitution.

Article 1, section 2(a) of the California Constitution provides,

> [e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

This section has been held by the California Courts to include the free speech protections of, and be more protective than, the First Amendment to the United States Constitution. *See, e.g., Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), *aff'd*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980).

Thus, Article 1, section 2(a) should be an independent state ground for the decision. In the absence of any specific references by the California Court of Appeal to the State Constitution, this Court has jurisdiction to consider the federal question. However, any ultimate determination by this Court contrary to the decision of the California courts would require a remand to the California courts for consideration of California law.

III. ARGUMENT AGAINST GRANTING THE WRIT OF CERTIORARI.

A. This Court Has Previously Rejected Certiorari Involving The Same Underlying Issue.

Respondent respectfully notes that this Court previously denied certiorari in an action involving the same issue applied to even broader restrictions by the State of Maine on actual credit reports. *Equifax Services, Inc. v. Cohen*, 420 A.2d 189 (Me. 1980), *cert. denied*, 450 U.S. 916, 101 S.Ct. 1368, 67 L.Ed.2d 342 (1981). Therein, the Maine Supreme Court had held a state law imposing certain restrictions on credit reports was an unconstitutional restraint on First Amendment rights. The Maine Court assumed that credit reports were "commercial speech," and yet it nonetheless struck down the law on the grounds that the prohibitions in the law were so overbroad that they prohibited even the accurate reporting of public record information. The Maine court thus held that the law failed to meet the test for "commercial speech" restrictions set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

This case involves issues far more limited than those raised in *Equifax Services*. The "public records" involved here are publicly-available court records, the reporting of which has been specifically protected by this Court, and the "credit reports" involved here are limited only to information from these court records.

B. Certiorari Is Not Required To Determine Whether Credit Reports Are "Commercial Speech."

Petitioner contends that this Court should grant certiorari to resolve the question of whether credit reports fall within the "commercial speech" doctrine of the First Amendment. First, as set forth in the Court of Appeal's decision, this is no longer an open question. Second, even if it were, this case does not necessarily present that issue to the Court.

1. Whether Credit Reports Are "Commercial Speech" Is Not An Open Question.

The definition of "commercial speech" is speech that "proposes a commercial transaction." This Court has held that the "proposal" of a commercial transaction is not limited to actual offers to sell, such as the pharmacy advertisements in *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), but that a "proposal" includes ordinary promotional materials,[6] including commercials,[7] signs,[8] Tupperware parties,[9] and product labels.[10]

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[6] *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, supra.*

[7] *United States v. Edge Broadcasting Co.*, ___ U.S. ___, 113 S.Ct. 2696, ___ L.Ed.2d ___ (1993).

[8] *Linmark Associates, Inc. v. Willington*, 431 U.S. 85, 97 S.Ct. 1614, 50 L.Ed.2d 155 (1977); *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986).

[9] *Board of Trustees v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989).

[10] *Rubin v. Coors*, ___ U.S. ___, 115 S.Ct. 1585, ___ L.Ed.2d ___ (1995).

This Court addressed the question of whether credit reports were "commercial speech" in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985). There, the Court expressly stated that it was not holding that credit reports were "commercial speech."[11] In fact, four dissenting justices believed that such reports were definitely not commercial speech.[12]

For her argument, Petitioner relies solely on a phrase used by this Court describing "commercial speech" as speech which is "related solely to the economic interest of the speaker and its audience."[13] From this language, Petitioner concludes that any speech which is solely in the economic interest of the reader is commercial speech. This is not the result intended by the Court in *Hudson Central*. Indeed, Petitioner's new definition of "commercial speech" would result in lessened constitutional protection for the financial pages of newspapers, most of the Wall Street Journal, and even, as conceded by Petitioner's counsel at oral argument before the Court of Appeal, the magazine "Consumer Reports".

This Court has already rejected Petitioner's contention that any speech relating to the economic interests of the listener is, *a fortiori*, "commercial speech." In *Board of Trustees v. Fox, supra*, the Court considered the difference between Tupperware parties (which it held were commercial speech) and job counseling (which it held was not

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[11] 472 U.S. at 762, n.8.

[12] 472 U.S. at 790 (dissenting opinion).

[13] *Central Hudson Gas & Electric Corp. v. Public Service Comm'n, supra*, 447 U.S. at 561.

commercial speech). Job counseling, although obviously related to the economic interest of the speaker and its audience, was determined not to be commercial speech for the simple reason that it did not propose a commercial transaction.[14]

2. This Case Does Not Necessarily Raise The Question Of Whether Tenant Screening Reports Are Commercial Speech.

Even if the question of whether credit reports are "commercial speech" were unresolved, this case does not necessarily raise that issue.

First, tenant screening reports are sufficiently different from ordinary credit reports that any determination here with regard to the tenant screening reports would leave lingering questions regarding actual credit reports.

Second, the question of whether the tenant screening reports are "commercial speech" may not be reached in this case. The trial court, for example, ruled that the Statute was unconstitutional under this Court's previous rulings regardless of whether or not the tenant screening reports were "commercial speech." Indeed, in *Equifax Services*, the Maine Supreme Court assumed that the credit reports were "commercial speech" and nonetheless struck down the statute under the *Central Hudson* test.

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[14] 492 U.S. at 482 ("While these examples consist of speech for a profit, they do not consist of speech that *proposes* a commercial transaction, which is what defines commercial speech." (emphasis in original)).

Finally, as set forth below, neither the State nor Petitioner produced any of the evidence required by this Court to validate legitimate restrictions on even "commercial speech."

3. There Is No Evidence To Support Any Claim That The Statute Is A Lawful Restraint On Free Speech.

In First Amendment cases, the burden is on the government to prove the elements necessary to justify a restraint on speech, regardless of whether or not the speech is "commercial speech."

Moreover, this burden is not satisfied by the mere presumptions ordinarily given to legislative enactments. In *Edenfield v. Fane*, ___ U.S. ___, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) *supra*, the Court held that,

> [t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. [citations omitted] Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.

Id., 113 S.Ct. at 1800.

In the instant case, there is no evidence of any meritless unlawful detainer cases filed by landlords.[15] There is no evidence that any such cases have prejudiced anyone in obtaining housing. There is no evidence that any tenant screening reports have resulted in unfair boycotting of tenants or has resulted in the exclusion of anyone from housing. Finally, there is no evidence that the Statute promotes its purported goals.

The entire evidence in this case is contained in the stipulated facts set forth in the Petition at pages 15a to 40a, and much of even this is not admitted evidence.[16]

C. The Conceptual Scheme Of The Statute Is Contrary To The Fundamental Principles Of The First Amendment.

From an overview, the decision of the California Court of Appeal is obviously correct and requires no review.

The California Legislature perceived a problem which it wished to redress. However, rather than directly attack the problem, the Legislature chose to accomplish its goal by the device of keeping the public ignorant of

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[15] It was stipulated that some dismissed cases would have been won by landlords and some by tenants, but there was no evidence that any of them were meritless. Petition at pages 18a-19a.

[16] The stipulation relates only to the authenticity of exhibits F through I. It does not stipulate to their admissibility. Indeed, the question of admissibility is expressly reserved. Petition at page 21a. These exhibits are clearly inadmissible hearsay and were neither offered nor admitted as evidence at trial.

certain truthful information. This Court has repeatedly rejected this type of "paternalistic approach."[17] The basic scheme adopted by the California Legislature for accomplishing its goal is inimical to the First Amendment.

This is not to say that the California Legislature could not have accomplished its desired goals by other methods. As the California Court of Appeal concluded,

> there are any number of things the State may lawfully do to protect renters who are subject to or who have suffered an eviction. What it cannot do is to act in violation of the Constitution.

Petition at page 13a.

IV. CONCLUSION.

For the foregoing reasons, Respondent respectfully requests the Court deny the Petition for Writ of Certiorari.

Dated: December ___, 1995

Respectfully submitted,

STEPHEN L. JONES
Attorney for Respondent
Apartment Association of
Greater Los Angeles

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[17] *See, e.g., Virginia Pharmacy Board v. Virginia Consumer Council, supra,* 425 U.S. at 769-70.